



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

December 13, 2013

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Timothy D. Hugo
Member, House of Delegates
Post Office Box 893
Centreville, Virginia 20122

Dear Delegate Hugo:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*

Issue Presented

You ask whether it is permissible under Virginia law for a lender who extends open-end credit pursuant to § 6.2-312 of the *Code of Virginia* to charge an annual membership fee.

Response

It is my opinion that an annual membership fee is not a “finance charge,” provided that such annual membership fee is assessed as a condition of access to the credit plan and regardless of whether a borrower actually receives an extension of credit from the lender. Consequently, it is my further opinion that a lender who extends open-end credit pursuant to § 6.2-312 may charge borrowers an annual membership fee in connection with the provision of open-end credit, regardless of whether the borrower repays the balance in full by the close of a minimum 25-day billing cycle.

Applicable Law and Discussion

Section 6.2-312 generally permits lenders to offer open-end credit plans to borrowers, and, in connection with such plans, to require payment of finance charges and other fees. Most relevantly, § 6.2-312(A) provides the following:

Notwithstanding any provision of this chapter other than § 6.2-327, and except as provided in subsection C, a seller or lender engaged in extending credit under an open-end credit plan may impose, on credit extended under the plan, *finance charges and other charges and fees* at such rates and in such amounts and manner as may be agreed upon by the creditor and the obligor, if under the plan a finance charge is imposed upon the obligor if payment in full of the unpaid balance is not received at the place designated by the creditor prior to the next billing date, which shall be at least 25 days later than the prior billing date.^[1]

Based on a plain reading of the statute, § 6.2-312(A) clearly distinguishes between “finance charges”

¹ Emphasis added.

and “other charges and fees.”² If a fee is a “finance charge,” the lender may assess it only if the borrower fails to fully repay the balance in full by the close of the (minimum 25 day) billing cycle. If a fee is an “other charge[] or fee[],” a lender may assess it regardless of whether the borrower repays the balance in full by the close of the (minimum 25 day) billing cycle. In this regard, I must examine whether the annual membership fee you describe is a “finance charge,” or another charge or fee contemplated by the statute.

For purposes of Title 6.2, the term “finance charge” is defined as having “the meaning assigned to it in Federal Reserve Board Regulation Z, 12 C.F.R. § 226.4, as amended.”³ Regulation Z to the federal Truth-in-Lending Act⁴ generally defines “finance charge” as “the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor *as an incident to or a condition of the extension of credit.*”⁵ Regulation Z further specifically excludes from the definition of “finance charge” “[f]ees charged for participation in a credit plan, whether assessed on an annual or other periodic^[6] basis.”⁷ Further instructive are the official Federal Reserve Board comments regarding participation fees:

The participation fees described in [12 C.F.R.] § 226.4(c)(4) do not necessarily have to be formal membership fees, nor are they limited to credit card plans. The provision applies to any credit plan in which payment of a fee is a condition of access to the plan itself, but it does not apply to fees imposed separately on individual closed-end transactions. The fee may be charged on a monthly, annual, or other periodic basis; a one-time, non-recurring fee imposed at the time an account is opened is not a fee that is charged on a periodic basis and may not be treated as a participation fee.^[8]

The foregoing definition of, and commentary on, the term “finance charge” are clear and unambiguous. To be considered a “finance charge,” a charge must be dependent on whether the borrower actually receives a loan or other extension of credit.⁹ Further helpful to my understanding of the meaning of “finance charge” is the clear exclusion of periodic fees charged for the mere participation in a credit plan, as opposed to the actual receipt of one or more extensions of credit pursuant to such a credit plan.¹⁰ The Federal Reserve Board comments further clarify that a participation fee must be charged at regular intervals on a

² “When construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.” *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 230 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 877, 882 (2011)) (further citation and internal question marks omitted). “We ‘assume the legislature chose, with care, the words it used when it enacted the relevant statute.’” *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

³ VA. CODE ANN. § 6.2-100 (2010).

⁴ The federal Truth in Lending Act is generally cited as 15 USCS §§ 1601 through 1693r (2013).

⁵ 12 C.F.R. § 226.4(a) (2013) (emphasis added).

⁶ The word “periodic” is not defined in Regulation Z or the Truth-in-Lending Act. Absent a statutory definition, words are given their ordinary meaning. 1987-88 Op. Va. Att’y Gen. 513, 514. *Merriam-Webster’s Dictionary* defines “periodic” as, most relevantly, “occurring or recurring at regular intervals.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 862 (10th ed. 2001).

⁷ 12 C.F.R. § 226.4(c)(4) (2013).

⁸ 12 C.F.R. pt. 226, supp. I, § 226.4, annot. (2013) (comment 4(c)(4)(1), “Official Staff Interpretations”).

⁹ 12 C.F.R. § 226.4(a) (defining “finance charge”).

¹⁰ See 12 C.F.R. § 226.4(c)(4).

recurring basis.¹¹ Accordingly, I conclude that an annual membership fee is not a finance charge, provided that it is assessed for the privilege of participation in a credit plan, and not based on the actual extension of credit to the borrower. Because an annual membership fee is not a “finance charge” under Title 6.2, I also conclude that a lender offering credit under § 6.2-312 may assess an annual membership fee regardless of whether the balance is repaid in full by the borrower prior to the close of a minimum 25-day billing cycle.

Conclusion

Accordingly, it is my opinion that an annual membership fee is not a “finance charge,” provided that such annual membership fee is assessed as a condition of access to the credit plan and regardless of whether a borrower actually receives an extension of credit from the lender. Consequently, it is my further opinion that a lender who extends open-end credit pursuant to § 6.2-312 may charge borrowers an annual membership fee in connection with the provision of open-end credit, regardless of whether the borrower repays the balance in full by the close of a minimum 25-day billing cycle.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

¹¹ See *supra* notes 6 and 8 and accompanying text.